

Green, LindaE

From: Lisa Fuhrmann <lfuhrmann@earthjustice.org>
Sent: Tuesday, May 1, 2018 3:24 PM
To: FOIA HQ; Best-Wong, Benita; Ross, David P; Pruitt, Scott
Cc: Jennifer Chavez; Janette Brimmer
Subject: FOIA Request
Attachments: FOIA to EPA_3031_2018_FINAL.pdf

Dear FOIA Officer, Mr. Pruitt, Mr. Ross, and Ms. Best-Wong,

Please see the attached FOIA Request submitted on behalf of Earthjustice, Sierra Club, and Puget Soundkeeper Alliance. Please send future correspondence regarding this request to **Janette K. Brimmer** (jbrimmer@earthjustice.org) and Jennifer Chavez (jchavez@earthjustice.org).

Best,
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May 1, 2018

Via electronic mail only

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Re: Waters of the United States; Freedom of Information Act Request

Dear FOIA Officer, Mr. Pruitt, Mr. Ross, and Ms. Best-Wong:

This letter is submitted on behalf of Earthjustice, Sierra Club, and Puget Soundkeeper Alliance (the "Conservation Organizations") and is a request for information pursuant to the Freedom of Information Act, 5 U.S.C. § 552 and relevant Environmental Protection Agency ("EPA") regulations, 40 C.F.R. §2.10 et seq.

On February 28, 2017, President Trump signed an Executive Order directing review and potential revision of the Waters of the United States Rule, 80 Fed. Reg. 37,054 (June 29, 2015) (hereafter the "Clean Water Rule"), instructing that such review and any revision must be in keeping with Justice Scalia's opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). In news stories that same day and shortly thereafter, Mr. Pruitt vowed to quickly withdraw the Clean Water Rule. On April 4, 2017, Inside EPA reported the following:

EPA appears to be planning to slow or end existing Clean Water Act (CWA) enforcement cases that use Justice Anthony Kennedy's test for determining the law's reach, defying long-running agency guidance and legal precedent even before EPA writes a new CWA jurisdiction rule using a narrower test authored by the late Justice Antonin Scalia.

According to Inside EPA, an internal EPA document directed staff in the agency's Office of Enforcement & Compliance Assurance to use the narrower Justice Scalia test and to quickly implement that directive, even before any revision to or replacement for the Clean Water Rule.

Further, on March 31, 2017, Mark Pollins, Director of EPA's Water Enforcement Division, sent an email to numerous Regional Clean Water Act Enforcement contacts requesting that, in light of the February 28 Executive Order, they send "information about [their] active and open CWA (e.g., 311, 402, 404, CAFOs, stormwater) judicial and administrative enforcement docket in preparation for a meeting with senior leadership" (email attached).

This request encompasses two periods and categories of documents:

1. The period **from March 31, 2017, to the time response is provided**, and is for the following documents:
 - Any document responsive to Mark Pollins' March 31, 2017 email and his request for information "for each case whether the Region established jurisdiction for the alleged violations based on the test outlined by Justice Kennedy in *Rapanos*, the nature of the violations and the status of the case";
 - Any document referring or related to Clean Water Act jurisdiction, Justice Scalia's test, and/or Justice Kennedy's test sent to or from the Regional Clean Water Act Enforcement Contacts included in Mark Pollins' March 31, 2017 email;
 - Any document referring or related to Clean Water Act jurisdiction, Justice Scalia's test, and/or Justice Kennedy's test sent to or from Susan Bodine, Assistant Administrator for the Office of Enforcement and Compliance Assurance.
2. The period **from February 8, 2018, to the time response is provided**, and is for the following documents:
 - Any document directing staff at EPA to slow or end the use of Justice Kennedy's test for determining Clean Water Act jurisdiction;
 - Any document directing staff at EPA to use Justice Scalia's test for determining Clean Water Act jurisdiction;
 - Any document referring or related to Justice Kennedy's test for determining Clean Water Act jurisdiction;
 - Any document referring or related to Justice Scalia's test for determining Clean Water Act jurisdiction;
 - Any document giving direction to EPA staff regarding rewrite, amendment, repeal or withdrawal of the Clean Water Rule 80 Fed. Reg. 37,054 (June 29, 2015).

As used in this request "document" means and includes all recorded, graphic, or written communications, whether electronic or paper, including but not limited to memoranda, letters, correspondence, reports, briefs, directives, emails, notes, messages, text messages, and telephone conversation recordings.

Administrator Pruitt, FOIA Officer,
and OWOW
May 1, 2018
Page 3

In the event that any requested document is claimed, or continues to be claimed, exempt from disclosure or review, or otherwise withheld, we request an index or log of documents withheld, with the maximum possible identifying information that you can provide, including a description of the document withheld, its date, its location, its recipient(s) and the specific reason(s) the document is being withheld. 5 U.S.C. § 552(b).

Request to Expedite Response

We respectfully request expedited processing of this FOIA request, pursuant to 40 C.F.R. § 2.104(e). The Conservation Organizations have a compelling need to obtain the records expeditiously, because Clean Water Act enforcement is of significant importance to the public and EPA is making and must make daily decisions regarding compliance with Clean Water Act requirements. To the extent that the EPA is making decisions that constrain the reach and availability of protections under the Clean Water Act, the public has a right to know in order to ensure that the public can exercise its rights under the law. Further, public users of the water (for recreation, for drinking, for catching and eating fish) have an immediate right to know if the Act will be enforced against actions that may be adversely affecting their health and livelihoods. If the agency is deciding not to enforce the Clean Water Act for particular waters, pollution, impairment or destruction of those waters could be occurring immediately and daily and each day causes harm. As set forth below, the Conservation Organizations are public interest organizations engaged in protection of all waters and of oversight and enforcement of government actions and implementation of our most important environmental laws such as the Clean Water Act. Also as set forth below the Conservation Organizations are positioned well to inform the public and educate the public about the import and effects of the agency decisions and actions at issue here. We certify that this information is true and correct to the best of the undersigned's belief.

Fee Waiver Request

We also respectfully request that EPA waive all fees in connection with this request, as provided by 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l). This request concerns a matter of significant public importance regarding the operations and activities of government, specifically EPA. EPA must make decisions on where and when to enforce Clean Water Act requirements and constraints on those decisions and EPA's attendant enforcement of the Act's requirements affect the public in many ways, both immediate and long-term. To the extent that the agency is making decisions that constrain the reach and availability of protections under the Clean Water Act, the public has a right to know in order to ensure that the public can protect itself and exercise its rights under the law. If the agency is deciding not to enforce the Clean Water Act for particular waters, pollution, impairment or destruction of those waters could be occurring immediately and daily and each day causes harm.

The information sought goes directly to the issue of where and when EPA will be enforcing, or not, Clean Water Act requirements. It will therefore contribute to and increase public

Administrator Pruitt, FOIA Officer,
and OWOW
May 1, 2018
Page 4

understanding of waters that may be at risk, but for which EPA will not enforce or apply Clean Water Act requirements.

The Conservation Organizations have demonstrated experience and expertise needed to analyze the requested records and disseminate the information and analysis to the public. The Conservation Organizations each have protection of the environment and enforcement of the nation's environmental laws at the core of their respective missions. Puget Soundkeeper is specifically focused on protection of the Sound as well as all waters within the Puget Sound watershed and Puget Soundkeeper maintains a website, newsletter, and email alerts that educate and disseminate information to the public regarding Puget Sound and the Clean Water Act regularly to members of the public. All of the Conservation Organizations correspond regularly and directly with various media about their work and policy and government matters that relate to clean water and the environment. The Conservation Organizations will use the requested information to contribute to public understanding, engagement, and protection on matters of application and enforcement of the Clean Water Act.

None of the Conservation Organizations have a commercial interest in the requested records. The records are requested entirely for the public purpose of advancing public knowledge and public interest work of the Conservation Organizations.

Please do not hesitate to contact the undersigned should you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Janette K. Brimmer', with a long horizontal flourish extending to the right.

Janette K. Brimmer

Jennifer Chavez

Earthjustice

*And on behalf of Sierra Club and Puget Soundkeeper
Alliance*

cc: Aaron Isherwood, Sierra Club
Chris Wilke, Puget Soundkeeper Alliance

Attachment 1

From: Pollins, Mark

Sent: Friday, March 31, 2017 3:37 PM

To: Dart, Denny <Dart.Denny@epa.gov>; Wagner, Michael <wagner.michael@epa.gov>; McKenna, Douglas <McKenna.Douglas@epa.gov>; Kraft, Nicole <Kraft.Nicole@epa.gov>; Modigliani, Justine <Modigliani.Justine@epa.gov>; Kuefler, Patrick <kuefler.patrick@epa.gov>; Mendoza, Stephen <mendoza.stephen@epa.gov>; Dinsmore, Andrew <Dinsmore.Andrew@epa.gov>; Field, Stephen <Field.Stephen@epa.gov>; McGuigan, David <McGuigan.David@epa.gov>; Saunders, Jerry <Saunders.Jerry@epa.gov>; McDonald, Scott <mcdonald.scott@epa.gov>; Huffman, Diane <Huffman.Diane@epa.gov>; Breedlove, Dan <Breedlove.Dan@epa.gov>; Palomares, Art <Palomares.Art@epa.gov>; Eppers, Jim <Eppers.Jim@epa.gov>; Greenberg, Ken <Greenberg.Ken@epa.gov>; Wampler, David <Wampler.David@epa.gov>; Kermish, Laurie <Kermish.Laurie@epa.gov>; Kenknight, Jeff <Kenknight.Jeff@epa.gov>; Steiner-Riley, Cara <Steiner-Riley.Cara@epa.gov>; Bahr, Ryan <bahr.ryan@epa.gov>; Vantil, Barbara <vantil.barbara@epa.gov>; DeJong, Stephanie <DeJong.Stephanie@epa.gov>; Higgins, John <higgins.john@epa.gov>; Armstrong, Joan <Armstrong.Joan@epa.gov>; Parent, Suzanne <Parent.Suzanne@epa.gov>; Davis, Anita <Davis.Anita@epa.gov>; Ghosh, Mita <Ghosh.Mita@epa.gov>; Jaffess, Sharon <jaffess.sharon@epa.gov>; Kyte, Larry <kyte.larry@epa.gov>; Peycke, Mark <Peycke.Mark@epa.gov>
Cc: Cherry, Andrew <Cherry.Andrew@epa.gov>; Theis, Joseph <Theis.Joseph@epa.gov>; Bahk, Benjamin <Bahk.Benjamin@epa.gov>; Speir, Jeffrey <speir.jeffrey@epa.gov>; Denton, Loren <Denton.Loren@epa.gov>; Shinkman, Susan <Shinkman.Susan@epa.gov>; Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>; Cozad, David <Cozad.David@epa.gov>
Subject: Request for jurisdictional information on active CWA cases

To all Regional CWA Enforcement Contacts:

In light of the February 28 Executive Order requiring EPA to consider interpreting the term “navigable waters” consistent with the opinion of Justice Scalia in *Rapanos v. U.S.* in future rulemaking regarding the definition of the “waters of the United States,” we are gathering information about your active and open CWA (e.g., 311, 402, 404, CAFOs, stormwater) judicial and administrative enforcement docket in preparation for a meeting with senior leadership. This request applies to all open CWA judicial and administrative enforcement actions (e.g., judicial referrals, judicial complaints filed, unilateral administrative orders, administrative complaints, administrative orders on consent), whether in development, investigation, or negotiations. This request does not apply to judicial actions with a Consent Decree entered or lodged or to resolved administrative enforcement actions.

We request limited and basic information on CWA jurisdiction. Specifically, for each case whether the Region established jurisdiction for the alleged violations based on the test outlined by Justice Kennedy in *Rapanos*, the nature of the violations and the status of the case. We would also appreciate your best estimate of the number and percent of total CWA cases which rely solely on the Kennedy test.

Thank you for your assistance and we request this information by Tuesday, April 4 at 3 PM EST to allow us to assemble it for the Wednesday meeting. We recognize the burden placed upon you and your staff, and have attempted to ask only for the information that is necessary to complete this task. The schedule is beyond our control. If you have questions or need assistance with this request, please contact Andrew Cherry (202-564-2589) or Jeff Speir (202-564-0872).

Mark

Mark Pollins, Director
Water Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance (OECA)
U.S. Environmental Protection Agency
Phone: (202) 564-4001
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